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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,	
Plaintiff and Respondent,	G041320
v.	(Super. Ct. No. SWF018067)
JORGE JIRON,	O P I N I O N
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Riverside County, Albert J. Wojcik, Judge. Affirmed.

Richard Glen Boire, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Ronald Jakob and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

The jury acquitted defendant Jorge Jiron of the charged crime of first degree murder, but convicted him of the lesser included offense of voluntary manslaughter. (Pen. Code, § 192, subd. (a).)[1] The jury found defendant personally used a broken bottle as a deadly weapon. (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23).) The judge sentenced defendant to the upper term of 11 years for voluntary manslaughter, plus one consecutive year for the deadly weapon enhancement.

Defendant contends the court abused its discretion by sentencing him to the upper term for voluntary manslaughter. He argues the court imposed the upper term based on facts the jury found to be *not* true when it acquitted him of murder. We disagree and affirm the judgment.

FACTS

The victim, Jose Jesus Mendoza-Martinez (Martinez), was killed on the night of September 8, 2006, in the carport area of an apartment complex in Hemet. Martinez was the first cousin of brothers Victor Mendoza and Miguel Angel Mendoza.[2] Juan Jose Puga was a brother-in-law of the Mendoza brothers. Sergio Del Rio was a coworker of Victor and Martinez. Martinez and Miguel lived with Puga and his family in apartment 18 at the Hemet complex.

September 8, 2006 was a Friday and a payday. That evening, after finishing their work day, Martinez, Del Rio, and Victor came to the Hemet apartment complex and socialized in the carport area. Del Rio worked on his car while Martinez, Victor and Miguel drank beer.

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[1] All statutory references are to the Penal Code.

[2] To avoid confusion we refer to the Mendoza brothers by their first names. We mean no disrespect.

At some point, Victor noticed a separate group of four to six people whom he had seen before in passing, including defendant. Defendant had driven a red truck to the location. Defendant was by his parked truck, drinking beer.

Sometime before 10:00 p.m., Martinez walked toward apartment 18 to use the restroom. Defendant was alone in the red truck, backing it up and "about to leave." When Martinez was near the truck, defendant stopped the vehicle and got out. Defendant and Martinez started fighting — punching and grabbing each other.

Defendant broke a bottle on Martinez's head. Martinez may have broken a bottle on defendant's head or may have thrown a bottle at defendant's head. About a minute later, Martinez and defendant separated. Martinez was bleeding from the neck, had blood all over the front of his shirt, and did nothing "else to defend himself." Defendant held a broken bottle in his hand and "taunted" Martinez by asking him, "Do you want more?"

Martinez could not "stand up very well." He walked slowly toward a nearby wall, where he "held out his hand" to support himself on the floor and sat back against the wall.

Victor yelled at defendant to drop the bottle and leave Martinez alone. Defendant continued to hold the broken bottle and chased Victor, and then Del Rio.

According to Victor's trial testimony, defendant then went to the seated Martinez, "and while [Martinez] was trying to hold himself up," defendant said, "I'm killing this one," and stabbed Martinez in the back with the broken bottle.

Defendant then left the scene "[t]hrough the back by the fence."

Victor phoned 911. He, Miguel and Del Rio put Martinez in Victor's car to take Martinez to the hospital. Officers dispatched to the scene observed blood and broken bottles all around the carport area, suggesting a fight had taken place. Martinez, who appeared to be still alive, lay in a vehicle, "gurgling, choking on his own blood." He had several large lacerations to the jugular vein on the left side of his neck, "blood all

over him[, c]uts and scrapes on his body, [and a] ripped t-shirt." Paramedics arrived and declared Martinez dead.

Defendant was arrested and an officer read defendant his Miranda rights,[3] which defendant indicated he understood. Defendant stated he got off work that day around 4:00 p.m., dropped off a coworker at the apartment complex, and stayed in the carport area to socialize with friends and drink beer. He stated he drove a red (burgundy) truck. Defendant said he did not know Martinez.

Defendant stated Martinez came up and hit him "for no reason" while defendant was sitting in his truck. Defendant said he and Martinez were exchanging words in a "pretty even fight" when he felt a bottle hit his head, and saw four bottles being thrown at him by eight people. He believed a bottle had broken the windshield or a window of his truck. He said Martinez bit him. Defendant said he left the scene all beaten up. Defendant eventually admitted he might have struck Martinez with a bottle three or four times and that the bottle might have broken while he was hitting Martinez with it. He denied striking Martinez in the neck with the bottle. At the end of the interview, defendant cried, said he felt bad, and stated "that when one is mad, one doesn't know what he is doing."

Martinez's autopsy report identified the cause of death as "sharp force injury of neck." This "large, ragged, sharp force injury" on the left side of his neck was the only life-threatening injury, was caused "by a sharp implement," and cut his jugular vessel in two separate places. Martinez also suffered "multiple sharp force injuries to his body," as well as abrasions, lacerations, bruises, and "blunt force trauma" to his mouth and lip area. The deep wound in Martinez's back was consistent with a standing attacker stabbing Martinez with a beer bottle while Martinez was on his knees or seated.

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

DISCUSSION

The Court Did Not Abuse Its Discretion or Violate Defendant's Constitutional Rights by Imposing the Upper Term for Voluntary Manslaughter

Defendant contends the court "specifically relied upon facts that were clearly rejected by the jury when it found [him] not guilty of murder." Defendant concludes, in "the absence of those 'facts,' the evidence was insufficient to support the trial court's finding that the offense 'involved a great deal of violence' or 'disclosed a great degree of callousness,' [citation], or any other factor in aggravation."

"Voluntary manslaughter is punishable by imprisonment in the state prison for 3, 6, or 11 years." (§ 193, subd. (a).) "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." (§ 1170, subd. (b).) "The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected . . . ." (*Ibid.*)

"In exercising his or her discretion in selecting one of the three authorized prison terms referred to in section 1170(b), the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision." (Cal. Rules of Court, rule 4.420(b).) Aggravating circumstances include that: "(1) The crime involved great violence . . . or other acts disclosing a high degree of cruelty, viciousness, or callousness"; and "(2) [t]he defendant has engaged in violent conduct that indicates a serious danger to society." (Cal. Rules of Court, rule 4.421(a)(1), (b)(1).) "Under California's determinate sentencing system, the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term." (*People v. Black* (2007) 41 Cal.4th 799, 813.)

Nonetheless, the "trial court need only 'state [its] reasons' [citation]; it is not required to identify aggravating and mitigating factors, apply a preponderance of the

evidence standard, or specify the 'ultimate facts' that 'justify the term selected.' [Citation.] Rather, the court must 'state in simple language the primary factor or factors that support the exercise of discretion.'" (*People v. Sandoval* (2007) 41 Cal.4th 825, 850-851.)

A court's sentencing decision is "subject to review for abuse of discretion." (*Sandoval*, 41 Cal.4th at p. 847.) "A reviewing court is entitled to presume the sentencing court properly exercised its discretion in imposing sentence absent evidence to the contrary." (*People v. Montano* (1992) 6 Cal.App.4th 118, 121.)

Here, the court sentenced defendant to the upper term of 11 years for voluntary manslaughter. Based on the evidence presented at trial, the court believed it was reasonable to assume the jury found "the crime involved a great deal of violence." The court further found "the crime disclosed a great degree of callousness," because defendant said "'I'm killing this one' and proceed[ed] to stab [Martinez] in the back," even though Martinez was "on the ground" and "out of it." The court stated it sentenced defendant to the upper term in the best interests of justice, after considering the record, the probation report, "the significance of the crime committed," and "the gravity and nature of the offense," and the fact that "this particular voluntary manslaughter [was] much more egregious than what one might normally consider to be a situation of voluntary manslaughter."

In light of the court's comments, defendant's contention on appeal boils down to this: The jury, by acquitting him of murder and convicting him of voluntary manslaughter, found that he did *not* engage in violent conduct indicating a serious danger to society and that the crime did *not* involve great violence and a high degree of callousness. In support of this proposition, defendant argues the jurors positively rejected Victor's testimony that defendant stabbed Martinez after saying, "I'm killing this one." According to defendant, when "that portion of Victor Mendoza's testimony is

disregarded, the evidence is insufficient to support the trial court's finding that 'the crime involved a great deal of violence' or 'disclosed a great degree of callousness.'"

We examine the import of the jury's convicting defendant of voluntary manslaughter instead of murder. "Murder is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) "[M]alice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188.)

Voluntary manslaughter "is the unlawful killing of a human being without malice" "upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) The distinguishing feature separating murder from manslaughter is that "murder includes, but manslaughter lacks, the element of malice." (*People v. Rios* (2000) 23 Cal.4th 450, 460.) A """"defendant who intentionally and unlawfully kills [nonetheless] lacks malice . . . when [he] acts in a 'sudden quarrel or heat of passion' [citation], or . . . kills in 'unreasonable self-defense'""" (*Ibid.*) "[T]his is also true of a killer who, acting with conscious disregard for life and knowing that the conduct endangers the life of another, *unintentionally* but unlawfully kills in a sudden quarrel or heat of passion." (*People v. Lasko* (2000) 23 Cal.4th 101, 104.) Provocation reduces "an intentional, unlawful killing from murder to voluntary manslaughter 'by *negating the element of malice* that otherwise inheres in such a homicide [citation].' [Citation.] *Provocation* has this effect because of the words of section 192 itself, which specify that an unlawful killing that lacks malice because committed 'upon a sudden quarrel or heat of passion' is voluntary manslaughter." (*Rios*, at p. 461.) Because provocation negates malice, but is not an element of the crime of voluntary manslaughter, the People are *not* required to prove beyond a reasonable doubt that the defendant was provoked. (*Id*. at p. 463.)

"'An intentional, unlawful homicide is "upon a sudden quarrel or heat of passion" [citation], and is thus voluntary manslaughter [citation], if the killer's reason was actually obscured as the result of a strong passion aroused by a "provocation" sufficient to cause an "'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than judgment.'"' [Citation.] No specific type of provocation is required, and 'the passion aroused need not be anger or rage, but can be any """[v]iolent, intense, high-wrought or enthusiastic emotion""" [citations] other than revenge [citation].'" (*People v. Lasko, supra,* 23 Cal.4th at p. 108.)

"'[I]f sufficient time has elapsed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter.'" (*People v. Daniels* (1991) 52 Cal.3d 815, 868.) Voluntary manslaughter must be committed "'suddenly as a response to the provocation, and not belatedly as revenge or punishment.'" (*Ibid.*) The court instructed the jury that "the duration of the cooling period is the time that it would take the average or ordinarily reasonable person to have cooled the passion and for that person's reason to have returned."[4]

We apply these principles to the case at hand. The jury, by convicting defendant of voluntary manslaughter and acquitting him of murder, necessarily found he killed Martinez intentionally, or acted with conscious disregard for life, under

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[4] As relevant here, the court instructed the jury with CALJIC Nos. 8.37 (Manslaughter — Defined); 8.40 (Voluntary Manslaughter — Defined); 8.42 (Sudden Quarrel or Heat of Passion and Provocation Explained); 8.43 (Murder or Manslaughter — Cooling Period); 8.44 (No Specific Emotion Alone Constitutes Heat of Passion); and 8.45 (Involuntary Manslaughter — Defined). Inter alia, the court instructed the jury that: Voluntary manslaughter is an unlawful killing "without malice aforethought but either with an intent to kill or with conscious disregard for human life," and upon "a sudden quarrel or heat of passion, or in the actual but unreasonable belief in the necessity to defend oneself . . . ." "The heat of passion which will reduce a homicide to manslaughter must be such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances."

provocation of a sudden quarrel or heat of passion or in unreasonable self-defense. Such a finding by the jury is entirely consistent with the court's conclusion the crime involved great violence or callousness. In other words, the jury could find defendant acted intentionally, violently, callously, *and* under provocation or in unreasonable self-defense, so as to be guilty of voluntary manslaughter but not murder. Thus, contrary to defendant's contention about Victor's testimony, the jury's verdict is *not* inconsistent with a finding that defendant stabbed Martinez in the back after or while saying, "This one I'll kill." And even if the jury had indeed rejected Victor's testimony, the evidence amply supported the court's findings of great violence and callousness based upon the nature of the fatal injuries inflicted by defendant upon Martinez.

In sum, substantial evidence — i.e., "evidence which is reasonable, credible, and of solid value" (*People v. Johnson* (1980) 26 Cal.3d 557, 578) — supports a finding defendant acted intentionally, violently, callously, and under provocation. A sentencing court "'need only determine whether aggravating factors are established by a preponderance of evidence.'" (*People v. Towne* (2008) 44 Cal.4th 63, 85.) "Nothing in the applicable statute or rules suggests that a trial court must ignore evidence related to the offense of which the defendant was convicted, merely because that evidence did not convince a jury that the defendant was guilty beyond a reasonable doubt of related offenses." (*Id.* at pp. 85-86.)

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.